United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

JANUARY TERM, 1910.

No. 2101. 693

OTTMAR SONNEMANN, APPELLANT,

vs.

THE PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, A CORPORATION.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED DECEMBER 29, 1909.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

JANUARY TERM, 1910.

No. 2101.

OTTMAR SONNEMANN, APPELLANT,

vs.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, A CORPORATION, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 30, 1909.

In the Court of Appeals of the District of Columbia.

No. 2101.

OTTMAR SONNEMANN, Appellant,
vs.
THE PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, a Corporation.

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1 Supreme Court of the District of Columbia.

At Law. No. 49768.

OTTMAR SONNEMANN, Plaintiff,
vs.
THE PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, a Corporation, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Declaration.

Filed August 27, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 49768.

OTTMAR SONNEMANN, Plaintiff,
vs.
THE PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, a Corporation, Defendant.

The plaintiff, Ottmar Sonnemann, sues the defendant, the Philadelphia, Baltimore and Washington Railroad Company, a corporation, for that heretofore, to wit, on the 27th day of May, A. D., 1907,

the said defendant was possessed of a certain steam derrick at
2 one of the freight yards of the said defendant situate at the intersection of Twelfth street and Maryland Avenue, Southwest, in the City of Washington, in the District of Columbia, and said steam derrick was used and employed by the defendant for the purpose of loading and unloading heavy materials upon and from the freight cars of the defendant company, and was then and there under the management, care, control and operation of a servant of the said defendant, whose duty it became and was to so manage, care for, control and operate the said steam derrick as not to injure those assisting in the loading and unloading of the freight cars of said defendant: and the plaintiff says that on the day and year aforesaid and at the place aforesaid, he was in the employ of The George W. Knox Express Company, a corporation and was rightfully and lawfully upon a freight car of the defendant company, and was directing and assisting the loading upon said freight car of certain pieces of iron of a great weight, to wit, of the weight of three hundred and fifty pounds each, which said pieces of iron were then and there being hoisted together by the said steam derrick of the defendant company and were then and there being placed upon the said freight car of the defendant upon which plaintiff was standing, and the said defendant, by its servant, not regarding its duty in that behalf, so negligently, improperly, and carelessly managed and controlled the said steam derrick that certain pieces of iron then and there being hoisted by said steam derrick upon said freight car fell against and upon the plaintiff, crushing and wounding him, the said plaintiff, and breaking the bones of the head and face of the said plaintiff, and wounding the back and arm of the said plaintiff, whereby the plaintiff was permanently injured and
3 became and was sick, sore, lame, and disordered, and so continued for a long space of time, to wit, from thence hitherto, to the damage of the plaintiff in the sum of Five thousand dollars ($5000.00). Wherefore the plaintiff brings this suit and claims the sum of Five thousand dollars, ($5000.00), besides the costs of this suit.

CHAPIN BROWN,
Attorney for Plaintiff.

Rule to Plead.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of service hereof; otherwise judgment.

CHAPIN BROWN,
Attorney for Plaintiff.

Plea.

Filed September 20, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 49768.

OTTMAR SONNEMANN, Plaintiff,
vs.
THE PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, a Corporation, Defendant.

Now comes the defendant, The Philadelphia, Baltimore and Washington Railroad Company, by its attorneys, McKenney & Flannery, and for plea to the declaration of the plaintiff filed in the above entitled cause says that it is not guilty in the manner and form therein alleged.

McKENNEY & FLANNERY,
Attorneys for Defendant.

4 *Replication.*

Filed September 20, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 49768.

OTTMAR SONNEMANN, Plaintiff,
vs.
THE PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, a Corporation, Defendant.

The plaintiff joins issue upon the defendant's plea.

CHAPIN BROWN,
Attorney for Plaintiff.

Memorandum.

October 21, 1909.—Verdict for Defendant.

5 Supreme Court of the District of Columbia.

WEDNESDAY, *October* 27, 1909.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

At Law. No. 49768.

OTTMAR SONNEMANN, Pl't'f,
vs.
THE PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, a Corporation, Def't.

The time within which to move for a new trial having expired, judgment on verdict is ordered.

Therefore, it is considered that the plaintiff take nothing by his suit, and that the defendant go thereof without day, and recover against the plaintiff the costs of its defense, to be taxed by the Clerk, and have execution thereof.

Order for Appeal.

Filed Nov. 12, 1909.

In the Supreme Court of the District of Columbia, the 12th Day of November, 1909.

At Law. No. 49768.

OTTMAR SONNEMANN, Plaintiff,
vs.
THE PHILADELPHIA, BALTIMORE & WASHINGTON RAILROAD COMPANY, a Corporation, Defendant.

6 The Clerk of said Court will enter an appeal in this cause to the Court of Appeals of the District of Columbia from the judgment rendered herein, and will issue citation to the appellee, the defendant herein.

CHAPIN BROWN,
Attorney for Plaintiff.

7 Filed Nov. 13, 1909. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

At Law. No. 49768.

OTTMAR SONNEMANN
vs.
THE PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, a Corporation.

The President of the United States to The Philadelphia, Baltimore and Washington Railroad Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing

the cause therein, under and as directed by the Rules of said Court, pursuant to an Appeal from the Supreme Court of the District of Columbia, on the 12th day of November, 1909, wherein Ottmar Sonnemann Appellant, and you are Appellee, to show cause, if any there be, why the Judgment rendered against the said Appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Harry M. Clabaugh, Chief Justice of the Supreme Court of the District of Columbia, this 13th day of November in the year of our Lord one thousand nine hundred and nine.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk.*
By H. BINGHAM,
Ass't Clerk.

Service of the above Citation accepted this 13th day of November, 1909.

McKENNEY & FLANNERY,
Attorney- for Appellee.

[Endorsed:] No. 49,768. Law. Equity. Ottmar Sonnemann vs. P., B. & W. R. R. Co. Citation. Issued Nov. 13th, 1909. Filed Nov. 13, 1909. J. R. Young, Clerk. C. Brown, Attorney for Appellant.

8 *Memoranda.*

November 18, 1909.—Appeal bond approved and filed.
December 9, 1909.—Bill of Exceptions submitted to Court.

Supreme Court of the District of Columbia.

FRIDAY, *December* 17, 1909.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

At Law. No. 49768.

OTTMAR SONNEMANN, Pl't'f,
vs.
THE PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, a Corporation, Def't.

Now comes here the plaintiff by his Attorneys and prays the Court to sign, seal and make part of the record, his bill of exceptions taken during the trial of this cause, (heretofore submitted) now for then, which is accordingly done.

9 In the Supreme Court of the District of Columbia.

Law. No. 49768.

OTTMAR SONNEMANN, Plaintiff,
vs.
PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, a Corporation, Defendant.

Plaintiff's Bill of Exceptions.

Be it remembered that at the trial of this cause the plaintiff, in order to maintain the issues on his part joined, produced as a witness OTTMAR SONNEMANN who being duly sworn testified that for some years he was employed as foreman of a gang of men employed by the Knox Express Company to do heavy hauling; that he was so employed on the 27th day of May 1907, on which day he was engaged in hauling heavy pieces of iron for one Louis Simon, from 15th and H streets, N. E., to the freight yard of the Philadelphia, Baltimore and Washington Railroad Company at 12th street and Maryland Avenue, Southwest, in the city of Washington; that the iron consisted of four inch angle irons which had been around a water tank, semi-circular in shape, each weighing from 275 to 300 pounds, and about 18 feet in diameter (model exhibited by witness); that there were five such pieces lying on the wagon, the angles in one another; that he was assisted by Andrew Payne, Jim Jefferson, and William Johnson, all of whom were employed by the Knox Express Company; that Jefferson had worked with witness for about five years, Payne between four and five years, and
10 Johnson probably a year and a half, all of whom had done similar work before this occasion, and that witness had been engaged many times in this kind of work before the accident of May 27, 1907; that on this day they hauled the iron from the stable of the Knox Express Company to the freight yards and drove up alongside the car that they were to put the iron in; the iron was lying on the wagon with the ends toward the car and the bow of the iron away from the car; that the engineer came up to the wagon, swung his boom over, and Jefferson placed the chain right around the iron, and hooked the hook over it right in the centre of it; when that was done, Jefferson gave the engineer orders to hoist his load which he did and brought the iron up where it hung perfectly level; when it was up as high as the edge of the car, the engineer swung it over to the car where witness stood in the car ready to receive it; that he caught hold of the iron to steady it down inside the car, and steer it down between the standard pockets of the car so that it would lie flat in the car as the iron was just as wide as the car was; witness then requested the engineer to lower down, to which request the engineer paid no attention; witness then called to the engineer a second time who replied "You are in a terrible hurry" or words to that effect, and then the engineer opened his

throttle and put on the steam, his boom swung to the north, and drew the chain from the irons, making the pieces of iron slip out of the chain and fall upon witness; that the first piece of iron struck witness across the back, another struck him on the head over the right eye breaking the bone of the skull, another piece of iron struck him on the back of his head, and another struck him across
the arm; that he was taken from the car to the freight office
11 and was there put into an ambulance and taken to the
Emergency Hospital; that witness saw the chain hooked right in the center of the iron; that unless it was hooked in the centre, it could not be lifted up as it would begin to slip as soon as raised unless hooked in the centre; that Jim Murray was the engineer in charge of the derrick which belongs to the Philadelphia, Baltimore and Washington Railroad Company and runs on their tracks in their freight yard, propelling itself up and down the track; that he does not know positively who employs Jim Murray, the engineer, but knows that he is not employed by the Knox Express Co.; that when he wanted to get the use of the derrick and Jim Murray he first got a car from the railroad company, drove up alongside the car and the engineer gets his orders from the yard clerk to load that car for us; that this has been the usual practice and custom down there for a long time; that he was at the Emergency Hospital for eleven days and that while there a piece of bone was taken out of his head and his head sewed up, and applications put on his arm to get the bruises out of it; that Dr. Sutton dressed the wound, and Dr. Vaughan examined him, and Dr. Chappell attended him when he went home; that about a week after he went home from the hospital he was around looking after the work, but stooping down to pick up anything caused pain in his head and that at this time he suffers with a dull headache all the time and there is a piece of bone sticking down in his eye which is very sore at times.

Upon cross-examination, the witness testified that the gang of workmen consisted of himself and the three colored men he had
mentioned; that his duty was to see that the work was done
12 and done right; that he got his orders from the Knox Ex-
press Company, through his brother William Sonnemann, who was general superintendent of that company; that his brother was the man connected with the Knox Express Company who came in contact with the shippers and it was he who made the contracts for doing the work; that the witness did not usually know the contract entered into with the shipper nor what the terms of the contract were; that his order in this case was to take this iron to the freight yard and load it on to a certain car, the number of which he got from the railroad company; that the iron was loaded on the wagons on a Saturday and on Monday following he drove the wagons to the 12th street yard; when he got there he saw the derrick man and waited his turn to load his car; the derrick man then brought his derrick up to the car, swung around his boom to the wagon, Jim Jefferson put the chain around the centre of iron and hooked it in the hook from the boom of the derrick and then gave orders to hoist

the load which was done and the iron was raised as high as the car and swung over and then stopped, the order to hoist and stop being given by the witness; witness then requested the engineer to lower the load to which the engineer paid no attention; witness asked the engineer the second time to lower his load when the engineer said "You are in a terrible hurry" and pushed open the throttle; witness saw the engineer of the derrick put his steam on as a result of which his boom gave a sudden jerk to the north which wrenched the chain from the irons and they came tumbling down one after another; that the chain used was the property of the Knox Express Company, and the derrick had no chain.

Thereupon ANDREW PAYNE, a witness of lawful age produced on behalf of plaintiff, being first duly sworn, testified that
13 he had been in the employ of the Knox Express Company but was now working for the Mechants Express Company; that on the 27th of May 1907, he was working for the Knox Express Company and hauled the second load of iron, Jim Jefferson having hauled the first load, which was taken from 15th & H streets, N. E., to the freight yard of the railroad at 12th street and Maryland Avenue; that the iron was angle iron which had been around a water tank and one piece of it weighed about 300 pounds; that he had often done hauling and loading of heavy iron and they were doing it all the time; that the persons at work with him on this occasion were Jim Jefferson, Johnson and Mr. Sonnemann; that the derrick was run up and down the tracks by steam of its own, and was operated by an engineer; he did not know how long the railroad company had employed the engineer; that when they got ready to load the iron Jim Jefferson hooked the ring in the derrick and then hooked the chain around the iron right at the centre, and then Jim told him to go ahead; that when the iron was raised above the car so as to swing over, Mr. Sonnemann, who was in the car, told the engineer to lower it, to which the engineer paid no attention; then Mr. Sonnemann called to the engineer again "Lower your load," to which the engineer replied "You are in a hell of a hurry"; then instead of lowering the load, the engineer swung the boom to the north which caused the iron to run out piece by piece, and they fell upon Mr. Sonnemann who could not get out of the way; that they helped Sonnemann out of the car and he was sent to the hospital in the ambulance; that he did not see Sonnemann at the hospital but saw him after he came from the hospital and resumed his work as foreman.

Upon cross examination, witness testified that he belonged
14 to the heavy moving gang, or bull gang, as it was called, because they did only heavy work such as moving iron safes, boilers and the like, stuff that is usually loaded on cars; that he got his orders from Mr. Sonnemann and his brother Mr. William Sonnemann; that he worked with Jim Jefferson to help him get the pieces of iron straight and level and hook them on; that he heard no conversation between Mr. Ottmar Sonnemann and the derrick man until the iron got up to the car; that Jim Jefferson gave the order to go

ahead after he hooked the iron; that when the wagon was opposite the car, the derrick man would come up and swing the boom to get the iron on the wagon; that they would tell him when the boom was low enough and tell him when to go ahead and that was the usual custom and that was done in this case; that Jim Jefferson hooked the iron in the middle and told the engineer to go ahead; that he took a bight around the iron with the chain, took the ring of the chain and hooked it into the ring on the crane; that the crane belonged to the Philadelphia, Baltimore and Washington Railroad; that the load swung perfectly level until it got up over the top of the car and Mr. Sonneman got hold of the end to steady it and lower it down into a proper place in the car; that he saw Mr. Sonnemann take hold of the iron and heard him call to the engineer to lower his load, but instead of doing so, he paid no attention to Mr. Sonnemann, who called again to the engineer to lower it; that the engineer swung the boom to the north and that caused the chain to slip and one piece of iron after another fell out; that Sonnemann did not pull the iron out at all toward himself; that when the engineer swung the boom to the north instead of lowering it, that the end of the iron near Sonnemann came down and pulled him underneath of it and he had to let go; that witness was
15 standing beside the wagon and saw it all, but did not hear any conversation between Jefferson and Mr. Sonnemann.

Whereupon GEORGE TULLY VAUGHAN, a witness of lawful age, produced on behalf of the plaintiff, having been first duly sworn testified that he is a surgeon and has made a practice of surgery for about 20 years in this city; that he is connected with a number of hospitals and was visiting surgeon at the Emergency Hospital in May 1907; that he was called to examine Mr. Sonnemann who had a cut over the eye where the bone was fractured, and a piece of bone was loose; that the injury to the bone was permanent.

Upon cross examination the witness testified that the permanent injury meant a change in the shape of the bone but that would not necessarily interfere with the ordinary functions of the bone at that point; that he saw no indication in this case that the injury seriously interfered with or impaired Mr. Sonnemann's usual functions about the eye although he had made no sufficient examination to ascertain that.

Thereupon WILLIAM JOHNSON, a witness of lawful age produced by the plaintiff, being first duly sworn, testified that in May 1907, he was employed by the Geo. W. Knox Express Company and was one of those engaged in moving the iron to the freight yard of the Philadelphia, Baltimore and Washington Railroad Company; that he was standing on the ground and saw the iron hooked while Mr. Sonnemann was in the car to receive the load from the wagon; that the iron was rusty; that Jim Jefferson wrapped the chain around the five pieces of iron and hooked it and then gave the signal
16 to hoist the load to the engineer who was in the derrick; that the load was hoisted and swung over the car when Mr. Sonne-

mann called "Lower your load" a second time after the engineer paid no attention to the first order; that the engineer said "You are in a mighty big hurry" and instead of lowering the load he swung to the north with a jerk which caused the iron to slip out and Mr. Sonnemann was struck by the pieces as they fell; that they helped Mr. Sonnemann out of the car and he walked to the railroad office where the ambulance came for him and he was taken to the Emergency Hospital; that he next saw Sonnemann about two weeks afterward when Sonnemann could not work as was not well and he could not see out of his eye yet.

Upon cross examination witness testified that he had belonged to this bull gang of the Knox Company for about a year and a half and during all that time he was working under Mr. Ottmar Sonnemann; that he first told how the accident occurred at the yard to a railroad man the day it happened; that he was standing by Jefferson when the chain was put around the iron, and Jefferson put the chain direct in the centre, an equal part from each end; that Sonnemann directed that the chain be put at the centre of the iron so that it would not slip; that Jefferson gave the order to hoist the load from the wagon; that this was done and the iron was swung over the car; that he was near the foot of the car and heard Sonnemann call "Lower your load" which the engineer did not heed; this call was repeated by Sonnemann when the engineer said "You are in a big hurry," and then the engineer swung the boom to the north with a jerk; that the accident happened on the 27th day of May 1907,
17 and that he made a note of the date; that Sonneman asked him if he would be a witness for him and he said he would; that he never told Sonnemann that he would not go into court because he would not tell a lie about it nor did he ever tell him that he could not testify so as to do him any good; that he has a paper at home on which the date of the accident is noted May 27, 1907, which note he made himself at the suggestion of nobody.

Thereupon W. W. Bowie, a witness for the plaintiff, being first duly sworn, testified that he was the freight agent of the Philadelphia, Baltimore and Washington Railroad at Washington, D. C.; that the company has a freight yard at 12th street and Maryland Avenue; that on May 27, 1907, the railroad company had a steam derrick there owned by it and operated by a man employed by the railroad company which paid his wages and had the right to discharge him; that the derrick was there for the public to use to load and unload heavy freight for patrons of the road.

Upon cross examination the witness testified that the derrick was for the use of the receivers and shippers of freight over the company's lines, that no charge was made for the use of the derrick, and that he had no control over the actions of the derrick man during the process of loading or unloading heavy freight as the engineer was instructed to operate the derrick at the orders of the parties using it, i. e. the parties who are loading or unloading; that the rule is that the loading and unloading of heavy freight is done by the

shipper and receiver and not by the railroad and that there is a tariff requirement for owners to load and unload heavy freight themselves. (An objection to the foregoing testimony of a tariff
18 requirement was objected to by counsel for the plaintiff on the ground that it was not proper cross examination and the objection sustained by the court.)

Thereupon JOHN W. CHAPPELL, a witness for the plaintiff, having been first duly sworn, testified that he was a practicing physician of 20 odd years experience in the neighborhood of Tennallytown, and some surgical experience in the outlying districts, but the more serious cases of surgery he sends to the hospitals of the city; that he treated Mr. Ottmar Sonnemann after he came back from the hospital and saw him at the hospital at the time of the injury; that Sonnemann had a severe wound over the eye, a cut or two on the head and some bruises about the body; after he came out of the hospital he treated the wound over the eye; that Sonnemann sustained quite a severe fracture of the frontal bone, the perpendicular plate as well as the horizontal plate which protects the eye or forms the upper orbit of the eye; that the lines of fracture can be seen and felt from the outside extending in two or three directions and a portion of the bone seems to be not firmly anchored although it is not floating. (No cross examination.)

Counsel for plaintiff thereupon announced their testimony closed, and rested.

Thereupon the defendant, to maintain the issues upon its part joined produced RICHARD T. RIDGELEY, who being first duly
19 sworn, testified that he was yard clerk for the Philadelphia, Baltimore and Washington Railroad Company and held that position at the 12th street yard in May 1907; that he recollected the accident in the 12th street yard to Mr. Ottmar Sonnemann; that as yard clerk it was his business to provide the car which he did for the Knox Express Company at the request of Mr. Will Sonnemann; that the first he knew of the accident was when Ottmar Sonnemann came to his office on May 27, 1907, with blood streaming from his head when he said to Sonnemann "What in the world is the matter with you, Ott," to which Sonnemann replied "nothing, it don't amount to anything"; that he then said to Sonnemann "You seem to be hurt; how did it happen," to which Sonnemann replied "Nobody's fault, nobody's fault, I guess it is my own fault. I don't blame anyone"; that the bill of lading submitted to him is the original bill of lading regarding the loading of this car, and he recognized it because it contained certain figures and stamp marks which he placed on it himself; that the stamp mark "Loaded by shipper" was put on the bill of lading by himself under the direction of Mr. Bowie, the freight agent; that he thinks that stamp appears on all bills of lading covering shipments out of his yard; that this bill of lading was presented to him by Mr. Will Sonnemann and the iron was being shipped for one Lewis Hopfenmaier; that

after he placed the marks upon the bill of lading he turned it back to Mr. Will Sonneman; that after the car was loaded he put it on the list signifying that the car was loaded and sent to the main office. (The bill of lading was offered in evidence, objected to and excluded by the court, as was also a certified copy of the official classification No. 29, in effect Jan. 1, 1907, of the Interstate Commerce Commission, which was objected to and excluded by the court.)

20 Thereupon WALTER W. BOWIE was recalled as a witness for the defendant and testified that he was freight agent of the Philadelphia, Baltimore & Washington Railroad and had been for ten years; that his connection with the movement of freight was only in an administrative capacity; that the witness Ridgeley was employed under him, and Ridgeley had the derrick under his supervision in a general way; that he would instruct the engine man who ran the derrick to give the use of the derrick to such loaders or unloaders as he designated; that no charge was made for the use of the derrick at any time; the witness then identified a shipping order of the shipper for a consignment of scrap iron destined to Wilmington, Delaware, and stated that from this shipping order a bill of lading is executed which is given to the shipper.

Upon cross examination witness testified that they had the derrick there for the use of the people and that the engineer in their employment went with the derrick.

Thereupon LOUIS SIMON, a witness of lawful age, was produced by and on behalf of the defendant, and after being first duly sworn, was asked the following questions:

By Mr. MCKENNEY: "Question. Mr. Simon, you say you are the shipper of this iron? Answer. Yes sir. Q. With whom did you make the agreement, if any, that you made for the transportation of the iron from its place at 15th and H streets where it was originally, to the 12th street yard of the defendant, the Philadelphia, Baltimore and Washington Railroad Company?"

21 To which last mentioned question the plaintiff, by his counsel, then and there objected, and stated as the grounds of his objections that the case at bar is one of tort: that it is not a question of contract; that notwithstanding the fact that this witness now on the stand may have made a contract with the George W. Knox Express Company to move this iron and put it on the cars of the defendant company, and even to accompany it to Wilmington, Delaware, it could not have any effect upon the issue in this case, it being simply a question of negligence on the part of the railroad company by its servant, the engineer; that even if the witness made a contract with the Knox Express Company to use his or its own derrick, not knowing the conditions at the yards of the railroad company, and when he got down there he found that the railroad company had furnished a derrick for the purpose of inducing business to them; and the derrick of the railroad company was under the railroad company's management, the employé managing the derrick was paid by the railroad company and they had the right to

discharge him; and although the defendant railroad company were not required to do what they did, yet if they undertook to do it, and did do it in the manner shown by the evidence, there being no prohibition against their doing it, and if they did it with their derrick and their engine and engineer, in their yards, running upon their tracks, still the defendant railroad company would be liable in this action in case of negligence of the engineer. The question is one of negligence and not contract; and the defendant railroad company would be liable for negligence of their employé regardless of a contract or any custom relating thereto; that when the freight, the iron,

22 was delivered in the freight yard it was in the possession of the defendant railroad company, just as this court has held that a passenger standing in the depot, ready to take a train, even though he had not taken it, if he went there for that purpose, is a passenger of the railroad company. Furthermore, the plaintiff is no party to any alleged contract. But the court overruled the said objection of the plaintiff, by his counsel, to the last mentioned question and allowed the witness to answer the same and following questions of the same effect, based upon that question; to which action of the court in overruling said objection and in allowing the witness to answer the questions, and questions, the plaintiff, by his counsel duly noted this his first exception, which was noted by the court on its minutes.

The witness then testified, subject to the objection of the plaintiff by his counsel, to all of the following testimony, which objections were stated to the court to be upon the grounds hereinbefore set forth in plaintiff's first exception, and which objections were overruled by the court, and exception duly noted by the plaintiff, by his counsel, and the testimony of this witness was all given subject to such objection and the first exception of the plaintiff hereinbefore set forth.

That the witness made his arrangements with The George W. Knox Express Company, through their manager, Mr. William Sonnemann; witness usually, when he had anything to move, called up Mr. Sonnemann and asked him to look at the material and tell him what he can put it on the cars for—load it at either one of the two depots, the Baltimore and Ohio or the Pennsylvania; in answer to which telephone message, Mr. Sonnemann will come by in the

23 course of the day and tell him how much he will charge per ton, and witness accepts it; that is the only agreement we ever have; that with respect to this particular shipment, his agreement with William Sonnemann was so much per ton; witness could not just recall how much per ton it was to load the material for him; that was all; the material was to be loaded on the Pennsylvania Railroad; The Knox Express Company was to furnish the wagons at 15th and H streets to move the material from there; The Knox Express Company was to furnish everything; the witness simply showed William Sonnemann the iron, or told him where the iron was, and he, William Sonnemann, was to take care of that iron until witness was ready to ship it, or until the car was ready; then the witness would make out a bill of lading, and sometimes leave it

to William Sonnemann to ship the car for the witness; other times the witness would go down himself and ship it; the witness is in the general business of shipping scrap iron and metals, and this was merely a shipment in the ordinary course with him; he does it every day; to the best of witness' knowledge, the bill of the Knox Company in this particular shipment, which bill was then handed to witness by defendant's counsel, is the bill covering that shipment. Which bill was offered in evidence and is as follows:

"WASHINGTON, D. C., *June 29th*, 1907.

Ledger ——.
Folio ——.

M. L. Simons to The Geo. W. Knox Express Co., Dr.

General Passenger, Baggage and Freight Transfer.

For Hauling: 38 tons iron from 15th & H to B. & P. at 75¢ $28.50.
Paid 7/3.

G. W. KNOX EX. CO.

June 29 Rec'd."

The plaintiff, by his counsel, thereupon further objected to the oral testimony given by the witness in reference to the said contract of the witness with the Knox Express Company upon the
24 further ground that the said contract between the said last mentioned parties had been reduced to writing in the form of said bill which was the best evidence of the contract and could not be contradicted by oral evidence, and that the said writing contained no provision or agreement by which the Knox Express Company was to load the 38 tons of iron upon the car, but did provide only for hauling the iron from 15th and H streets to the B. & P. Railroad. But the court overruled the objection of the plaintiff to the said oral testimony of the witness on the ground on which it was made, and allowed said oral testimony to stand as given by the witness; to which ruling of the court the plaintiff, by his counsel, then and there noted this, his second exception, which was noted by the court on its minutes.

Upon cross examination the witness testified that his usual method was to call Mr. William Sonnemann up by phone; but that day he (witness) might have met him on the street; he don't remember just whether he called him on the telephone that day, or met him; he couldn't state definitely and he don't remember what day it was; it wouldn't have been over a day or two prior to the moving of this iron; we usually get him one day and he starts to work within a day or so after that; witness didn't make any special arrangement with William Sonnemann on this case different from what he did in any other case; other than the witness would do tomorrow if he had occasion to call him up; witness would do the same as he did at that time—ask him how much to load this material and he would

come back and tell witness; witness had an arrangement, through Mr. William Sonnemann, whereby witness paid the Knox Express Company to take this material from 15th and H streets and load it on the B. & P. Railroad, or the Pennsylvania, as we term it,
25 and ship it; to see that it was put on the cars and passed the inspection that they have in their yard, so that I could get a bill of lading and ship it.

Thereupon WILLIAM SONNEMANN, a witness of lawful age produced by the defendant, being first duly sworn, testified that he was a brother of the plaintiff, Ottmar Sonnemann and that he had testified at the previous trial of this cause; that he was foreman for the Knox Express Company at the time of the injury on May 27, 1907, and that his duties consisted in inspecting bulky freights for shipment, and report to the office of The Knox Express Company and the office gave the estimates; he knew Louis Simon, and after the office had fixed the figure sometimes he communicated with Simon, and others, again, mostly the office wrote him a letter. In reference to what the witness had to do with making the estimate of the price for Mr. Simon, the witness testified that he went out and saw the iron and reported to the office, and the office, he thinks, gave Simon a price; that is customary; we made a contract with Mr. Simon to haul the iron to the railroad down to the derrick; the railroad furnishes the derrick, and with the use of the derrick, all we do is to put the sling on the iron and then tell the man to go ahead; then we are at the mercy of the derrick man until the iron is on the car; it is our duty to see that it is loaded so that it would pass inspection; our contract with Mr. Simon was to haul this iron from 15th & H streets, where it was and load it on board the car at the P. B. & W. Railroad Company's station with the assistance of the derrick; that is understood on all occasions when we haul bulky stuff to the railroad; that the railroad furnishes the derrick to load it
26 with; any expressman will haul the stuff down there, and then, with the assistance of the derrick, we put the slings on and then the engineer swings it on the car; our men still have charge of placing it in the car; what the derrick man does is to hoist it, swing it over the car, and drop it; the man who puts the sling on is supposed to give the orders to hoist; the man that puts the sling on gets into the car to place it usually; they generally keep one man at the car for that work; when we put the sling on we tell him (engineer) we are ready, but we can't give him any orders; we merely tell him, "All right, go ahead, we are ready"; then when he (engineer) is ready he hoists it; he goes ahead; "I have taken and put a sling on the iron and told him to go ahead. I was ready to go on, and he left the derrick alone and went and got his pay, and I waited there a couple of hours. You see, if he was under the orders of the man that was there, he could not do them things." He (engineer) did not do anything of that sort in this connection.

Thereupon JAMES JEFFERSON, a witness of lawful age produced by the defendant, being first duly sworn testified that he works for the Knox Company, and was working for the same company under Mr. Ottmar Sonnemann at the time of the injury to the latter; that the men in the gang consisted of Payne, Johnson and himself, with Mr. Sonnemann as foreman; that in response to the directions of Sonnemann he put the chain around the five pieces of iron, and then Sonnemann gave orders to the derrick man to hoist, and started to get into the car; that witness warned Sonnemann to stay out of the car but Sonnemann said it was all right, and witness walked up to the head of the horses and stood there while
27 he heard Sonnemann tell the derrick man to lower down slow; then he stepped up behind the derrick and saw Sonnemann have hold of the iron and that it was coming out like a hoop, and then he got behind the derrick to keep from seeing the blood; that he heard no language between Mr. Sonnemann and the derrick man; that the derrick man lowered the boom in response to the direction of Sonnemann; that the boom shook when lowered as it usually does and then the iron ran out like a hoop; that he saw Sonnemann at the hospital about a week after the accident and Sonneman asked him about a whiskey bottle which he had in his pocket; that the witness drank some of the whiskey, but he did not see anybody else drink any of it; that Sonnemann asked him also how many times he heard him tell the derrick man to slack down to which witness replied that he only heard him once.

Upon cross examination the witness testified that he hitched the chain as near as he could right in the middle and asked Payne if that was the middle and he said it was; that he had hitched the chain about heavy iron a hundred times; that he was not drunk the day of the accident although he is accustomed to his morning drink, and has been for years.

Thereupon JEDD GITTINGS, a witness of lawful age called by the defendant, being first duly sworn, testified that he was Secretary of the Knox Express Company, and had been connected with that company for 28 years; that the company conducted a general draying and hauling business; that his experience afforded him an opportunity to know whether any custom existed with respect to the loading and unloading of heavy bulk or carload freight in so far as the District of Columbia is concerned. The witness was there-
28 upon asked the following question by counsel for defendant:

Question. Will you state, if you know, what is the custom, and what has been the custom during the 28 years in which you have been engaged in this business, with respect to the shipment, in so far as loading and unloading is concerned, of heavy bulk or carload lots of freight?

To which question the plaintiff, by his counsel, then and there objected on the grounds that the case on trial was one of tort for the alleged negligence of the defendant railroad company, by its servant, and that evidence of a contract of a shipper with a dray-

man for hauling and loading freight, or evidence of a custom in relation to such a contract, or in relation to the loading of heavy freight or in carload lots, is incompetent and improper evidence bearing upon the issue involved in this case; the grounds of the objection to this question being more fully and at length set forth in the first above exception of the plaintiff, and the same grounds of objection made to the question involved in the first above exception of the plaintiff, were made to this next above question; but the court overruled the objection to the next above question, and allowed the said question to be answered, to which ruling of the court the plaintiff, by his counsel, noted this his fourth exception, which was noted by the court on its minutes.

Witness then testified, subject to the next above objection of the plaintiff and subject also to the overruling of said objection by the court and the exception noted by the plaintiff to the ruling of the court, as follows: That there was a custom as to the requirement as to who was under the obligation to load and unload, and that had been the unvarying custom during the 28 years of which the witness speaks, and that it has been the invariable custom that
29 the shipper is to load carloads of freight, and that when they ask us for a rate on hauling, we invariably include the loading of the freight on the car, and the cars are placed in position for unloading in the easiest manner possible. Witness further testified that he had knowledge of the shipment, on or about the 27th day of May 1907, of a lot of iron for one Louis Simon, and he knows that some of the iron was carried into the Knox Company's stables, and delivered from those stables to the cars, and loaded on the cars, and that its destination was Wilmington, Delaware, and that this shipment was a carload lot; and the witness also testified (subject to the objection of the plaintiff that the witness had not shown whether or not the contract of the Knox Company with Mr. Simon was in writing) that he had knowledge with respect to the contractual relations governing the movement of this shipment of freight for Mr. Simon, and that the Knox Company charged Simon a rate for hauling and putting on the cars.

All of the above testimony of this witness was given subject to the objection of the plaintiff to such testimony and an exception to the ruling of the court overruling such objection, the court directing the stenographer who was taking down the testimony in writing to note an objection to each one of the questions and that such objection was overruled by the court and an exception noted by the plaintiff. The ground of the objection to such testimony having been fully stated to the court in the first and fourth above exceptions.

Upon cross examination the witness testified that he meant by custom, a custom generally and that he acquired the knowledge
30 of such general custom by reason of his 28 years experience, and he came in contact with other draymen and has talked with them; that he did not draw the contract of the Knox Company with Simon but he knows what the Knox Company's books show; that he has not the books with him, but he can get them and will get them during the day; the books show a certain rate per ton

for hauling that material, and their rates are based always on loading and that is all it would show; it just simply shows the rate for hauling the material to the Pennsylvania Railroad, and that their rate invariably includes putting on the cars; that they do not show anything more than so much for hauling the material from one point to another. He has seen this steam derrick, and the greater portion of heavy freight was loaded by this derrick; he did not take at all that fact into consideration when he made this contract; he did not know that the men asked; probably it was something that could have been loaded either by hand or by crane; under certain conditions, it would cost the Knox Company more if it did not have that derrick down there, to load the freight, if it had to supply its own derrick. The witness did not know that it would in this case.

Upon re-direct examination, the witness testified that the Knox Company's books would show the charge to Simon of so much tonnage hauled from a certain point to the 14th street yard, or whatever it was, of the Pennsylvania Railroad for shipment.

Thereupon JAMES G. MURRAY, a witness of lawful age, produced on behalf of defendant, being first duly sworn, testified that at the present time he is a car repairer but that on the 27th of May
31 1907, he was in charge of the derrick of the Philadelphia, Baltimore and Washington Railroad Company at the 13th street freight yard and that Mr. Bowie was his immediate superior officer; that his orders were to load heavy freight according to the directions he got from the men bringing the freight there; that he got his orders as to what car to load from the yard clerk, but that the orders to raise, swing, and lower, he got from the person loading; that he remembers the accident of May 27, 1907; that he loaded that day under the direction of Mr. Sonnemann; that the chain which belonged to the Knox Company was put around the iron and the ring put into the hook of his crane; then Mr. Sonnemann told him to go ahead; that he raised the iron but he stopped after it was up as he saw the iron was not swinging properly and he cautioned Sonnemann about it; that he told Sonnemann that the iron was not swinging properly and was dangerous, but Sonnemann said go ahead, that he was running that part of it, and then told witness to swing the load over the car which he did, but that Sonnemann instead of waiting for witness to put the iron where it ought to have gone, caught hold of it himself and tried to place it, but in doing so, he pulled the iron out of the sling; that he got no order to lower and the derrick was standing perfectly still when the iron fell; that he never said to Sonnemann "You are in a might- big hurry" or "You are in a hell of a hurry," and that no such conversation took place; that when Sonnemann took hold of the iron he called to Sonnemann to let the iron alone and to get out of the car and from under it, but Sonnemann said he was running that; that the iron fell when Sonnemann caught hold of it and pulled it, because it was not hung properly as it was hanging over on the side; that he received no instructions or orders from any officer of the railroad com-
32 pany in respect to the operation of the crane during the process of loading and unloading, but his instructions from

Mr. Bowie were to do as the man loading or unloading ordered him to do.

Upon cross examination witness testified that the derrick ran upon a track under its own steam and that he could take it anywhere, and he served the different shippers in the order in which they came into the yard; that he followed the orders of the shippers in all cases of loading and unloading; that he got the order from Sonnemann to raise and swing the load, but not to lower it; that Sonnemann pulled the iron out of the sling because it was not hung in the centre, but at the side; that if the iron had been chained in the centre Sonnemann could not have pulled it out; that he did not turn the steam on again after shutting it off so as to make the boom swing to the north, but it was standing perfectly still.

Upon re-direct examination witness testified that the boom was standing still and remained so for a couple of minutes while Sonneman was pulling at the iron; that witness cautioned Sonnemann to get out of the car and Jefferson did also, Jefferson refusing to get into the car.

Thereupon GEORGE W. PETIT, a witness of lawful age, produced by the defendant, being first duly sworn, testified that he is foreman for The Merchant's Transfer and Storage Company, and that his duties as such foreman is to superintend the handling of their heavy freight, and sometimes to go out and contract on jobs and do anything; has been engaged in such business for 15 or 20 years. The
33 contracts are made with the Merchant's Transfer and Storage Company, and not with the witness; he has acted as the agent any number of times of that company in making these contracts for drayage between shippers of freight and that company. The witness gives the price and the company does the work at the price he makes; he makes the contract as far as the hauling and handling of it goes. The witness was then asked by counsel for the defendant the following question:

"Do you know anything about a custom in your business with respect to the loading — heavy freight or freight in carload lots, on cars?"

To which last mentioned question the plaintiff, by his counsel, objected on the ground that the case on trial was one of tort for the alleged negligence of the defendant railroad company, by its servant, and that evidence of a contract of a shipper with a drayman for hauling and loading freight, or evidence of a custom in relation to such a contract, or in relation to the loading of heavy freight or in carload lots, is incompetent and improper evidence bearing upon the issue involved in this case; the grounds of the objection to this question being more fully and at length set forth in the first above exception of the plaintiff, and the same grounds of objection made to the question involved in the first above exception of the plaintiff, were made to this next above question. The plaintiff, by his counsel, also objected to the next above question on the ground that the witness had not shown himself qualified by experience to testify to any such alleged custom, but the court overruled the objections to the

next above question, and allowed the said question to be answered, to which ruling of the court the plaintiff, by his counsel, noted this his fifth exception, which was noted by the court upon its minutes.

Witness further testified that he saw the accident to Son-
34 nemann and noticed that the iron was not swung in the centre and when Sonnemann tried to pull it to him and place it in position in the car, it seemed to run right out of the chain down on top of him; that the pieces of iron were 18 or 20 feet long, suspended by one chain, it was not hung in the centre and it would have been safer if two chains had been used instead of one; that Sonnemann could have lowered the iron to his knees and then pushed it where he wanted it instead of getting under it although to do this and to use two chains would have taken a little longer, but it would have been much safer for Sonnemann.

Upon cross examination witness testified that the chain used was strong enough to hold five pieces of iron weighing 275 pounds each; that using two ch*ings* on this iron would cause the chains to run together unless propped apart and that if the iron had been caught in the centre there was less likelihood of their running out; that he did not see the chain when Jim Jefferson put it around the iron, but saw them in the air just before they fell; that he had hauled a great deal of heavy freight for three different companies and that when he loaded such heavy stuff as this he always took into consideration the steam engine and derrick as a means of doing it and made their charge accordingly.

Thereupon the plaintiff recalled OTTMAR SONNEMANN, heretofore having been duly sworn as a witness, who was called in rebuttal and testified that he had no conversation with Richard D. Ridgeley on the 27th day of May 1907, and denied that he had said to him
35 the following: "Nothing; it don't amount to anything. I says"; and he denies that Ridgeley said to him "My soul, you seem to be hurt; how did it happen"; he denied that he answered "Nobody's fault; I guess it was my fault and don't blame anyone." Witness says that he was not in any condition to have a conversation with anybody and did not have a conversation with Ridgeley; witness denied that James Murray said to him that the iron was not swinging properly and was dangerous; that Murray did not say anything to him similar to that on the occasion of the day of the injury to him; that Murray did not give him any warning, none whatever.

On cross examination this witness testified that on the 27th day of May 1907, he did go to the clerk's office; he could not say whom he saw in the office; he could hardly see anybody; he supposes there was somebody there; he does not remember that anyone said anything to him while he was in the office; he does not remember of anyone saying anything to him except that he was to go to the hospital; he does not suppose he was in the office more than eight or ten minutes, if that long; there was some lady washing his head while he was in the office, but he did not know who she was; she came across the street with a bucket of water but what she was talking about he did not

know. He did't pay any attention to it at all; Wasn't in any condition to.

On re-direct examination witness testified that James Jefferson did not on the 27th day of May 1907, before the iron was received in the car, tell him that it was dangerous; the witness did not hear him say anything of that kind.

The plaintiff, by his counsel, then announced the testimony for the plaintiff in rebuttal closed, and rested his case.

36 And the foregoing evidence was all the evidence introduced in the trial of this cause by the plaintiff and defendant. At the conclusion of the evidence, the defendant moved the court, on all the evidence as above set forth and given on behalf of the plaintiff and defendant, and by way of demurrer to all the evidence, to instruct the jury to return a verdict for the defendant. The motion was granted by the court, to which ruling of the court in granting said motion, the plaintiff noted this his sixth exception which was duly noted on the minutes of the court; and from the judgment thereafter rendered on the verdict so returned under the instruction of the court, the plaintiff appealed.

Each of the separate and several exceptions taken by counsel for plaintiff to the rulings of the court as to the exclusion and admission of evidence, and as to the motion of the defendant, on all the evidence, to instruct the jury to return a verdict for the defendant, the whole evidence being hereinbefore set forth in this bill of exceptions, were so taken by counsel for plaintiff then and there, before the jury retired, separately and severally, and said exceptions were then and there separately and severally duly noted upon the minutes of the Justice presiding at the trial; and counsel for plaintiff then and there prayed the court to sign and seal this bill of exceptions, to have the same force and effect as if each of said exceptions were separately and severally set forth in a separate bill of exceptions; and at the request of counsel for plaintiff the same is accordingly signed and sealed and made a part of the record in the cause, now for then, this 17th day of December 1909. as and for the 9th day of December, 1909, the date on which said bill of exceptions was submitted to the court.

DAN THEW WRIGHT, *Justice.* [SEAL.]

We consent to the foregoing Bill of Exceptions.
McKENNEY & FLANNERY,
Attorneys for Defendant.
CHAPIN BROWN,
Att'y for Plaintiff.

Dec. 17, 1909.

37 *Designation of Record.*

Filed December 20, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 49768.

OTTMAR SONNEMANN, Plaintiff,
vs.
THE PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, a Corporation, Defendant.

The Clerk in preparing the transcript of record on appeal in the above entitled cause will embody the following, viz:

(1). The Plaintiff's Declaration.
(2). The Defendant's Plea.
(3). The Plaintiff's Joinder in Issue.
(4). Memo: Verdict of Jury of October 21, 1909.
(5). Judgment on Verdict.
(6). Order for Appeal.
(7). Citation.
(8). Memo: Appeal Bond approved and filed November 18, 1909.
(9). Memo: Bill of Exceptions submitted December 9, 1909.
(10). Order signing Bill of Exceptions December 17, 1909.
(11). Bill of Exceptions.
(12). Designation of Record.

CHAPIN BROWN,
JOHN P. EARNEST,
Attorneys for Plaintiff.

38 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 37 both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 49,768 at law, wherein Ottmar Sonnemann is Plaintiff and The Philadelphia, Baltimore and Washington Railroad Company, a corporation, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 28th day of December, 1909.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2101. Ottmar Sonnemann, appellant, vs. The Philadelphia, Baltimore and Washington Railroad Company, a corporation. Court of Appeals, District of Columbia. Filed Dec. 29, 1909. Henry W. Hodges, clerk.

IN THE

Court of Appeals, District of Columbia.

OCTOBER TERM, 1909.

No. 2101.

OTTMAR SONNEMANN, APPELLANT,

vs.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, A CORPORATION, APPELLEE.

It is stipulated and agreed by and between the parties to this cause that the trial court delivered the following opinion on sustaining the motion of the defendant below for a directed verdict at the close of all the evidence, and that said opinion shall be filed in this cause.

CHAPIN BROWN.
WILLIAM HITZ.

Opinion of the Court on Motion for Granting a Directed Verdict.

I cannot see any dispute between the parties which the evidence forms a reasonable basis for, on the facts of the matter. If there was a difference in the facts testified to by one witness and another, the matter might have to go to the jury; but there is none, and therefore it is a question of law that would have to be decided by the court. That is to say, the facts being conceded, the situation which the law draws from those facts, is a question of law to be passed on by the court and not by the jury.

There is no dispute on the following propositions of fact. I say no dispute—I mean there is no difference in the evidence—that the draymen had a contract with the shipper Simon, not only to carry the iron to the railroad yard, but to load it on the cars; that there was a general custom always acquiesced in, respecting the method of the transaction of business of this nature with the railroad company, that the shipper loaded the carload lots on the cars, and the railroad company had nothing to do with it. If this man was injured while the drayman was putting the iron on the car, without the active intervention of the railroad company, he cannot recover against the railroad company. Whether or not the railroad company intervened depends on whether or not this crane and engineer were at the time transacting the affairs of the railroad company or the business of the draymen. It is perfectly competent for the railroad company, or any other company or individual, to loan a mechanism, to loan a tool, to loan a purely physical thing to another, for him to use if he wants to; and it is equally appropriate to loan an employee, provided it is a distinct placing of the employee or paraphernalia, whichever it be, at the entire disposal of the borrower to be used by him or not as he chooses, and in the manner he chooses.

There does not appear to be any conflict of evidence upon the point that this crane, together with the engineer, were there at the disposal of the shippers, to be used if they desired and to be let alone if they did not wish to use them. In other words, it was a proffer of the railroad company to loan this aid to the shippers if they desired to avail themselves of it; but there is no rule or custom or instance shown in which the railroad company put any necessity upon the shipper to avail himself of this crane and engineer, before he could avail himself of their cars.

Therefore I am forced to the conclusion that there is no evidence here which tends to prove but that this was a loan of the crane and engineer by the railroad company to the drayman, who was under the obligation to load the stuff on the car. He did not have to accept it and avail himself of it unless he chose to; but when he chose to, the engineer and crane became, for the time being, the servants of the drayman, and were not in the service of the railroad company, in the sense of transacting any part of the railroad's business.

Therefore I can see no theory of law on which, under this situation of facts, the railroad company could be held responsible, even if the accident occurred through the negligence of the engineer. The motion will therefore be granted.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1909.

No. 2101.

OTTMAR SONNEMANN, APPELLANT,

vs.

PHILADELPHIA, BALTIMORE, AND WASHINGTON RAILROAD COMPANY, A CORPORATION, APPELLEE.

BRIEF ON BEHALF OF APPELLANT.

CHAPIN BROWN,
JOHN P. EARNEST,
Attorneys for Appellant.

THE LAW REPORTER PRINTING CO., WASHINGTON, D. C.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1909.

No. 2101.

OTTMAR SONNEMANN, APPELLANT,

vs.

PHILADELPHIA, BALTIMORE, AND WASHINGTON RAILROAD COMPANY, A CORPORATION, APPELLEE.

BRIEF ON BEHALF OF APPELLANT.

This is an appeal from a judgment rendered on a verdict returned by direction of the court in favor of the defendant below (appellee).

Statement of the Case.

This is an action in tort. The declaration (Rec., pp. 1 and 2) claims damages in the sum of $5,000, for personal injuries to the appellant caused by the negligence of the appellee by its agent. The appellant, Ottmar Sonnemann, was, according to the evidence (Rec., p. 6), on the 27th day of May, 1907, in the employ of the Knox Express Company and was foreman of a gang of men in the employ of that company, whose business it was to move heavy freight, and on the last mentioned day they were engaged in moving heavy pieces of iron from the northeast part of the city to

the freight yards of the railroad company (appellee) at Twelfth street and Maryland avenue southwest, for loading upon a car of the railroad company. The railroad company had in its said freight yard a steam derrick, owned by it and running upon the tracks in said freight yard, propelled by its own steam power and capable of running upon any of the company's tracks in said yard or elsewhere. This derrick and the engineer operating same were used by the railroad company to assist shippers in loading and unloading heavy freight upon or from the freight cars of the company. The steam derrick was in charge of an engineer named Murray, who was hired and paid by the railroad company, who alone had the right to discharge him. Murray got his orders as to what car to load from the yard clerk of the railroad company (Rec., p. 7), and those who brought loads of freight to the yard to load on cars had no control over the movements and conduct of Murray, the engineer, and only gave him signals or requests to hoist, swing, or lower the freight being handled by the steam derrick. On the day and year aforesaid, when the appellant, Sonnemann, arrived at the freight yards aforesaid of the railroad company he drove to the car designated to receive the freight upon his wagon, and Murray, the engineer of the steam derrick, brought the derrick up to the load and into position, so that the boom of the derrick would be over the wagon. In this position, with a chain about the load on the wagon and then hooked into the ring on the boom of the derrick, the load could be raised, swung, and lowered into the car which lay alongside. The iron lying upon the wagon which was to be hoisted into the car was angle iron, which had been about a water tank. It was semi-circular in shape, about eighteen feet in diameter, and each piece weighed about 275 to 300 pounds. Five of these pieces were lying together on the wagon, each fitted into the

other, and a chain was placed about the bundle of iron at the centre of the circumference as it lay upon the wagon, and the other end of the chain hooked into the ring on the boom of the steam derrick. The appellant, Sonnemann, then got into the car to place the iron properly inside the car, and the engineer, Murray, was requested to hoist the iron. He did so, and then swung the boom of the derrick over the car and stopped, the bundle of iron remaining stationary over the car. Appellant, Sonnemann, then requested the engineer, Murray, to lower down. The request was not heeded by the engineer, whereupon Sonnemann, appellant, again requested the engineer, Murray, to lower down, to which Murray, the engineer, replied: "You are in a terrible hurry," or words to that effect, and then Murray, the engineer, instead of lowering down as requested, swung the boom to the north with a sudden jerk and drew the chain holding the load from the pieces of iron, causing the iron to slip out of the chain and fall upon the appellant, breaking his skull over the right eye and bruising the back of his head, his arm, and his back. Appellant, Sonnemann, was taken to the Emergency Hospital and was kept there eleven days. A piece of bone was taken out of his head while he was at the hospital, and his head was sewed up and the bruises upon his body were treated. The injury to the skull is permanent and causes him to suffer with a dull headache all the time, and the injury to the skull left a piece of bone sticking down in his eye, which is very sore at times. The evidence of the appellee, the railroad company, tended to show that the injury was the result of appellant's own negligence.

At the conclusion of all the evidence, upon the motion of the appellee, the court directed the jury to return a verdict for the railroad company (appellee) upon the ground that under the law applicable to the case there

was no disputed matter of fact under the evidence for the consideration of the jury.

Assignment of Errors.

The court erred:

1. In directing the jury to return a verdict for the defendant (appellee) on the ground that under the law applicable to the case there was no disputed matter of fact under the evidence for the consideration of the jury.

2. In holding that Murray, the engineer of the steam derrick, was not at the time of the injury to the appellant the servant or agent of the defendant (appellee).

3. In holding that Murray, the engineer of the steam derrick, was at the time of the injury to the appellant, the servant or agent of the Knox Express Company, or of the shipper, Louis Simon.

4. In overruling the objection of the plaintiff to the questions asked the witness Louis Simon specified in the first exception of the plaintiff in his bill of exceptions.

5. In overruling the plaintiff's objection to the admission of oral testimony to change the terms of the written memorandum of contract between the Knox Express Company and Louis Simon, as specified in plaintiff's second exception.

ARGUMENT.

The chief question presented for the decision of the court in this case is whether Murray, the engineer of the steam derrick, was or was not at the time the injuries were inflicted upon Sonnemann, the servant of the railroad company. The declaration was prepared and the case proceeded upon the theory that Murray was, at the time the injuries

were inflicted, the servant of the railroad company, and that, consequently, the railroad company was responsible for the negligent acts of its servant whereby Sonnemann, without fault on his part, was injured. The court below held that, under all the evidence, Murray was not the servant of the railroad company at the time the injuries were inflicted and so directed the jury to return a verdict in favor of the railroad company. This, we submit, was error.

In this case it is necessary to inquire who was the master at the very time of the negligent act? This question is usually answered by ascertaining who has the power to control and direct the servant in the performance of his work, and we must carefully distinguish between authoritative direction and control, and mere suggestions and signals as to details in the cooperation necessary in the performance of the work. Murray was without doubt in the employment of the railroad company and was the servant of the railroad company. Was his status as such servant changed when, by direction of the yardmaster of the railroad company from whom he received his orders, he moved his steam derrick in such a place upon the tracks of the yard as to be in a position to respond to the suggestions or signals of draymen and shippers in the loading and unloading of heavy freight upon or from the cars of the railroad company? This question is answered by ascertaining the kind of control which the drayman or shipper exercised over Murray. If that control was authoritative and exclusive over him, Murray then became the servant of him to whom he was furnished. If, on the other hand, the railroad company retained direction and control of Murray, and all that the drayman or shipper could do was to give requests or signals in the work of loading to Murray, then Murray remained the servant of the railroad company. That the latter was the real situation in this

case, we submit there can be no doubt. The limited scope of the requests made by Sonnemann to Murray seems to be conclusive on this point. The only requests given were to *raise, swing,* and *lower* the loads of iron, and these as requests or signals necessary in the joint work of loading. That Murray took his time to obey such signals or did not obey them at all is clear from the evidence in this case, thus showing that he was not and did not consider himseif under the exclusive authority and control of the shipper or drayman. Moreover, in the testimony of William Sonnemann, brother of appellant, who had done a great deal of work with the aid of the steam derrick in loading heavy freight, and who was called as a witness by the railroad company, he says (Rec., p. 15):

> "When we put the sling on we tell him (engineer) we are ready, but we can't give him any orders; we merely tell him 'All right, go ahead, we are ready;' then when he (engineer) is ready he hoists it; he goes ahead; I have taken and put a sling on the iron and told him to go ahead. I was ready to go on, and he left the derrick alone and went and got his pay, and I waited there a couple of hours. You see, if he was under the orders of the man that was there, he could not do them things."

The position of Murray, the engineer of the steam derrick in this case, is analogous to the position of the driver of a livery team or a public conveyance in relation to a passenger in such conveyance. While the passenger must give the driver directions as to where he wishes to be conveyed, he does not by the giving of such directions become the master of the driver in the sense that he becomes responsible for the tortious acts of the driver, but on the contrary, the driver remains the servant of his original employer.

In Little *vs.* Hackett, 116 U. S., 366, it was held that a person who hires a public hack and gives the driver directions as to the place to which he wishes to be conveyed, but exercises no other control over the conduct of the driver, is not responsible for his acts or negligence, nor prevented from recovering against a railroad company for injuries suffered from a collision of its train with the hack caused by the negligence of both the managers of the train and of the driver.

And in Newbold *vs.* Harmon, 26 W. L. Rep., the late Mr. Justice Cole decided that a carriage and horses provided by law for the use of the executive departments of the Government, the driver thereof being borne on the rolls of that department and paid by the United States, was at the time of an accident caused by such driver's negligence being used by the head of the department for private purposes, does not create the relation of master and servant between that official and the driver of the carriage so as to render the former liable for the latter's negligence.

Again in Baltimore and Ohio Railroad Company *vs.* Adams, 10 App. Cases, D. C., this court held that a person who hires a public conveyance and gives the driver directions as to the place to which he wishes to be conveyed, but exercises no other control over the conduct of the driver, is not responsible for his acts of negligence or prevented from recovering from a railroad company for injuries suffered from a collision of its train with the conveyance caused by the negligence of both the managers of the train and of the driver.

It is apparent from the foregoing cases that the Supreme Court of the United States and this court have recognized the general principle that mere direction in the performance of a work does not make the party giving the direction the master of the party acting under

such direction, and such we submit is exactly the situation of the parties in the case at bar. Sonnemann gave certain directions to Murray consisting of requests to raise, swing, and lower, but did not and could not exercise any other control over his conduct. Consequently Murray was and remained the servant of the railroad company and did not become the servant of the shipper or drayman.

In Merritt *vs.* Old Colony, etc., Railway Company, 11 Allen (Mass.), 82, it is held that if a heavy article has been carried by a truckman to the depot of a railroad corporation, and injured while being loaded upon the cars, the railroad company are liable therefor if they had accepted and taken charge of same; and in such case it is no defense to an action against them, that the injury resulted in part from the carelessness of the truckman.

This was an action of tort against a railroad company to recover damages done to a caloric engine while being loaded upon the cars, which had been sent by the plaintiff (Merritt) to the depot of the defendant in South Boston for transportation to South Abington. The engine was being hoisted on the car from a sled by means of a derrick of the railroad company. During the trial, the defendant introduced evidence tending to show that the laborers received their orders from the truckman as to the mode of unloading the sled; that the freight agent requested the truckman to back his horse and sled so that the engine might be directly under the end of the boom of the derrick, but the truckman, in attempting to do so, started his horse forward and pulled the sled from under the engine, by reason of which it swung against the car and was broken.

The judge instructed the jury that the railroad's liability as common carrier commenced when the engine was delivered to and accepted by them for the purpose

of transportation; that until such delivery the truckman, who was also a common carrier, would be liable, but after such delivery and acceptance the railroad company would be liable for the negligence of those employed by them to load or transport the engine; that it was for the jury to determine from the evidence whether there had been such delivery and acceptance, and that in order to constitute such delivery and acceptance it must appear that the railroad had, through their agent, taken and assumed the charge and custody of the engine for the purpose of transportation; that if after the delivery and acceptance by the railroad company, the accident happened through the joint negligence of the railroad's servants and the truckman in assisting them to load the engine, the railroad company would be liable.

See also:

Kimball *vs.* Western R. R. Co., 6 Gray (Mass.), 542.
Burke, Admx., *vs.* The Norwich & Worcester R. R. Co., 34 Conn., 474.
Bowie *vs.* B. & O. R. R. Co., 1 MacA., 609.
Hugleson *vs.* R. & D. R. R. Co., 2 App. D. C., 98.
B. & O. R. R. Co., *vs.* Adams, 10 App. D. C., 97.

The case most like the case at bar and involving the same principle exactly is Standard Oil Company *vs.* Anderson, 212 U. S., 215. This case was decided February 1, 1909, by Mr. Justice Moody, who states the case as follows (Rec., p. 218):

> "The plaintiff (Anderson) was employed as a longshoreman by one Torrence, a master stevedore, who, under contract with the defendant (Standard Oil Company) was engaged in loading the ship Susquehanna with oil. The plaintiff was working in the hold, where, without fault on his part, he was struck and injured by a draft or load of cases containing oil, which was unexpectedly

lowered. The ship was alongside a dock belonging to the defendant and the cases of oil were conveyed from the dock to the hatch by hoisting them from the dock to a point over the hatch, whence they were lowered and guided into the hold. The work was done with great rapidity. The motive power was furnished by a steam winch and drum, and the hoisting and lowering were accomplished by means of a tackle, guy rope, and hoisting rope. The tackle and ropes were furnished and rigged by the stevedore, and the winch and drum were owned by the defendant and placed in its dock, some 50 feet distant from the hatch. All the work of loading was done by employees of the stevedore, except the operation of the winch, which was done by a winchman in the general employ of the defendant. The case was tried before a jury and the plaintiff had a verdict. The verdict establishes that the plaintiff was in the use of due care, and that his injuries were suffered by reason of the negligence of the winchman in improperly lowering the draft of cases into the hold.

"The only question presented is whether the winchman was, at the time the injuries were received, the servant of the defendant or of the stevedore. If he was the servant of the defendant, as he was found to be by the courts below, the defendant was responsible for his negligence. If not, that is the end of the case, and it is not necessary to inquire what would be the measure of liability of the stevedore.

"The decision of this question requires us to consider some further facts which were not disputed. The winchman was hired and paid by the defendant, who alone had the right to discharge him. The stevedore agreed to pay the defendant $1.50 a thousand for the hoisting. The stevedore had no control over the movements and conduct of the winchman, except as follows: The hours of labor of the winchman necessarily conformed to the hours of labor of the longshoreman. The

> winch and winchman were at a place where it was impossible to determine the proper time for hoisting and lowering the draft of cases of oil, and the winchman necessarily depended upon signals from others. These signals were given by an employee of the stevedore called a gangman, who stood upon the deck of the ship and gave signals to hoist or lower by the blowing of a whistle, which could be heard for a long distance. The negligence consisted in lowering a draft of cases before receiving this signal."

The remarkable similarity of this case with the case at bar is seen at once.

The court (through Mr. Justice Moody) continues at page 220 as follows:

> "It is insisted by the defendant that the winchman, though in its general employ, had ceased to be its servant, and had become, for the time being, with respect to the work negligently performed, the servant of the master stevedore. This may be true, although the winchman was selected, employed, paid and could be discharged by the defendant. If it is true, the defendant is not liable. The case therefore turns upon the decision of the question, whose servant was the winchman when he was guilty of the negligence which caused the injury."

In considering this question, the court (Mr. Justice Moody) says, at page 221:

> "It sometimes happens that one wishes a certain work to be done for his benefit, and neither has persons in his employ who can do it nor is willing to take such persons into his general service. He may then enter into an agreement with another. If that other furnishes him with men to do the work, and places them under his exclusive control in the performance of it, those men become pro hoc vice the servants of him to whom they are

furnished. But, on the other hand, one may prefer to enter into an agreement with another that that other, for a consideration, shall himself perform the work through servants of his own selection, retaining the direction and control of them. In the first case, he to whom the workmen are furnished is responsible for their negligence in the conduct of the work, because the work is his work, and they are, for the time, his workmen. In the second case, he who agrees to furnish the completed work through servants over whom he retains control is responsible for their negligence in the conduct of it, because, though it is done for the ultimate benefit of the other, it is still, in its doing, his own work. To determine whether a given case falls within the one class or the other, we must inquire whose is the work being performed—a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work. Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary cooperation, where the work furnished is part of a larger undertaking."

After citing certain authorities bearing upon the principles of law applicable to the case the court (Mr. Justice Moody) continues, page 225:

"Let the facts in evidence now be considered in the light of the foregoing principles of law. Was the winchman, at the time he negligently failed to observe the signals, engaged in the work of the master stevedore, under his rightful control, or was he rather engaged in the work of the defendant, under its rightful control? We think the latter was the true situation. The winchman was, undoubtedly, in the general employ of the defendant, who selected him, paid his wages, and had the right to discharge him for incompetency, misconduct, or any other reason. In order to relieve the defendant from the results

of the legal relation of master and servant it must appear that that relation, for the time, had been suspended, and a new like relation between the winchman and the stevedore had been created. The evidence in this case does not warrant the conclusion that this changed relation had come into existence. For reasons satisfactory to it the defendant preferred to do the work of hoisting itself, and received an agreed compensation for it. The power, the winch, the drum, and the winchman were its own. It did not furnish them, but furnished the work they did to the stevedore. That work was done by the defendant, for a price, as its own work, by and through its own instrumentalities and servant, under its own control.

"Much stress is laid upon the fact that the winchman obeyed the signals of the gangman, who represented the master stevedore, in timing the raising and lowering of the cases of oil; but when one large general work is undertaken by different persons, doing distinct parts of the same undertaking, there must be cooperation and coordination or there will be chaos. The giving of the signals under the circumstances of this case was not the giving of orders, but of information, and the obedience of those signals showed cooperation rather than subordination, and is not enough to show that there has been a change of masters."

So, in the case at bar, the requests to raise, swing, and lower "showed cooperation rather than subordination," to use the language of the court, "and is not enough to show that there has been a change of masters." The conclusion is irresistible from the evidence in this case that the railroad company did not furnish their steam derrick and their engineer, Murray, to the drayman or shipper, but merely furnished the work the steam derrick and Murray could do for the benefit of the railroad company, who, being common carriers, were anxious to

secure all the freight it could for shipment, and to expedite the loading of heavy freight by furnishing the work which would accelerate such loading in conjunction with the work of the shipper.

It will be seen that the ground of the Supreme Court's decision is not based upon the fact that the Standard Oil Company was paid directly and separately a consideration for the use of the winch and winchman. And it is further respectfully submitted that this separate payment of the $1.50 to the Standard Oil Company in no way distinguishes that case from the case at bar; because the railroad company in the case at bar in no sense *gratuitously* furnished the derrick and engineer to operate it. The derrick and engineer were furnished for a consideration received by the railroad company just as much as the use of all the other equipment of the railroad company is furnished to its patrons for a consideration; just as much as the use of its cars, its tracks, its other engines, its other employees, and all its other property, are furnished to its patrons for a consideration, and this consideration is paid by its patrons. The derrick and the engine used to run it were purchased, and the engineer who operated it was paid by the railroad company from revenues received from the patrons of the railroad company. In order for the railroad company to show that this derrick, engine and engineer were furnished gratuitously, it would be necessary for it to show, in effect, that a sufficient fund (separate from its capital, revenue, and regular assets, and having nothing to do with its corporate business) had been furnished by the stockholders of the railroad company, from which fund no revenue was derived for the stockholders. The natural and only inference to be drawn from the evidence produced at the trial below, is that the derrick and engine were bought and the engineer paid by the railroad

company from its general assets and revenues, and was a part of its general equipment, and that the railroad company receives a consideration for and from the use of this particular part of its equipment the same as it does from the use of its tracks, yards, freight cars, other engines and employees used in the transportation of its freights. So that while the practice of the railroad company is not to itemize its charges for the handling and transportation of freight, yet it is plain that the use of this derrick, engine, and engineer are fully paid for by the shippers of freight over its lines. One of the cases cited by Mr. Justice Moody in support of his decision is The Lisnacrieve, 89 Fed. Rep., p. 570, in which the winchman was furnished by the shipowner (as the engineer in the case at bar was furnished by the railroad company), no special charge being made for the services of the winchman, and yet the court held that he still remained the servant of the shipowner, and that the shipowner was responsible for his negligent acts.

In this last-cited case it was decided that—

> "where the owners of a ship furnish a winchman to assist in unloading they are liable to an employee of the stevedore, who is unloading the ship under a contract, for injuries caused by the negligence of the winchman, although they were under no contractual obligation to furnish the winchman, and although such winchman is working under the orders of the stevedore."

The court decided that the winchman was the servant of the shipowners, and says (p. 572):

> "The fact that the servant of one of the parties regulates his acts by the actions of the servants of the other does not make them coservants. In the present case the winchman was a general servant of the ship. He was put in charge of the ships machinery to perform a duty that the ship had assumed the duty of performing. He went to

his post of duty, or left the same, by no command of the stevedore, but simply because his master or his delegated agent so directed him. True the stevedore gave him a signal, and it was his duty to obey it; but this duty sprang from no contract of hiring made by the winchman with the stevedore, but purely or wholly from the relation of master and servant that existed between the winchman and the shipowners. When the stevedore signaled him to hoist, he was at perfect liberty to disobey this order so far as the stevedore was concerned, and the stevedore was helpless. Nay, if the stevedore had signaled him to hoist, and his master had directed him not to hoist, is there any doubt to whom he owed and would have rendered obedience? . . . The stevedore had not selected the winchman. The shipowner chose him. The stevedore was obliged to take him or no one. . . . The ship placed or retained him in charge of the winch. The stevedore could not send him to or from it. The stevedore did not pay him and could not discharge him. Assume that a person, not connected with the ship, but having a right to pass along the deck thereof, had, while so doing, been injured by the stevedore's culpably negligent operation of the winch, would it have been an excuse for the ship that it had for a while loaned this winch and winchman to a stevedore? Assume that another of the ship's servants had been injured by the winchman's culpable negligence, could such servant have recovered against the shipowner on the ground that the winchman had been borrowed by a stevedore, and that therefore the former and general relation of master and servant was so in abeyance that the doctrine of the negligence of coservants would not apply? . . . Cases may well arise where the servant of one person is engaged to assist another in respect to work in which the master has no interest. In such a case the servant would be temporarily released from his usual employment, and would ally himself to

> a new master, and recognize obedience to such a master. It will be observed that, in such a case, it would be quite within the power of the new master at his will to end the service of the servant. But in the present case the stevedore could not order the winchman to leave the winch. He could not replace him by another operator. In fact, he had no power over him whatever, except through the will and direction of the owners of the ship."

Liability for Torts Can Not be Avoided by Contract or Custom.

Having undertaken to do this, the railroad company is responsible for the negligent acts of its servant in the performance of the work furnished by the railroad company, and the law will not permit it to escape its responsibility therefor by contract or otherwise.

In 6 Cyc., p. 389, under the head of "Carriers," the law is stated as follows:

> "The rule prohibiting limitation by contract against negligence is often stated as a prohibition of any contract relieving the carrier from loss or damage caused by his own negligence or misfeasance or that of his servants, and it is specially decided in many cases that no contract limitation will relieve the carrier from liability for the consequences of the negligence, unskillfulness, or carelessness of its employers."

In note 66 under the foregoing extract, the court quotes the following:

> "A provision that when the carrier furnishes the shipper with laborers to assist in loading and unloading, they shall be deemed the shipper's servant while so engaged, and that the carrier shall not be responsible for their acts, is an attempt to release the carrier from responsibility for the negligence of his own servants and is void. Missouri Pac. R. R. Co. *vs.* Smith (Tex., 1891), 16 S. W. Rep., 803."

A very recent case bearing upon the question of contract against liability for negligence decided by the Court of Appeals of New York March 4, 1910, is the case of Frances M. Sciolaro *vs.* Joseph J. Asch, reported in the New York Law Journal, vol. 42, No. 136, page 2517. The question involved was whether the owner of a large office building could be relieved from responsibility for negligence caused by an elevator operator, where the elevator was operated by an independent contractor, although the elevator was owned by the owner of the building. The Court of Appeals decided that the owner of the building, which included the ownership of the elevator, was liable for the negligence of the operator of the elevator.

See, also, the cases collected in 5th Am. & Eng. Encyl. Law, 2d ed., page 187, note 5.

It was asserted below on behalf of the defendant railroad company that a custom prevailed to the effect that the shipper was required to load heavy freight such as that involved in the case at bar, but its assertion of an alleged custom was not sustained by the evidence, because it was an undisputed fact in the case as shown by all of the evidence, that the defendant railroad company invariably participated in the loading of heavy freight by its derrick and engineer. In other words, the defendant railroad company asserted a custom and then by its evidence disproved it.

In conclusion it is respectfully submitted that the court below erred in holding that the engineer was the agent and servant of the shipper or his drayman, and in not holding that the engineer was the agent and servant of the defendant railroad company, and in holding generallythat there was no undisputed fact shown by the evidence for the decision of the jury,especially the question

of fact raised by the first and second exceptions of the plaintiff and involved in the fourth and fifth assignments of error, and in taking the case from the jury upon all the evidence and directing a verdict for the defendant.

We respectfully submit that the judgment below should be reversed and the case remanded for a new trial.

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Court of Appeals, District of Columbia.

APRIL TERM, 1910.

No. 2101.

OTTMAR SONNEMANN, APPELLANT,

vs.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, A CORPORATION, APPELLEE.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

Statement of Facts.

This is an appeal from a judgment at law upon a verdict for the defendant directed by the court after consideration of all the evidence of both parties in a negligence case. The plaintiff below, who is appellant here, was an employee of the Knox Express Company, an incorporated drayman, and he claims damages in the sum of $5,000 for personal injuries received while at work for said Knox Express Company in the freight

yard of the defendant railroad company in the city of Washington, which injuries are alleged to have been due to the negligence of a servant of the railroad company, the sole defendant in the case. The injuries in question occurred in May, 1907, at which time the appellant was the foreman of said Knox Company in charge of its movement of heavy freight, and in the course of his said employment he had frequent occasion to load and unload such freight for his employer in the yards of the railroad company to and from the cars of said company (Record, pp. 6-9). The contracts between his employer and the owners of said freight, covering the movement and loading thereof upon cars in the railroad yard, were made by his superior officers in the Knox Company, and he got his orders relating thereto from the superintendent of said company (7).

On the occasion in question his orders were to take certain heavy pieces of iron from a certain place in the city and load them on a certain car in the railroad yard (7). The defendant railroad company maintained in its freight yard a certain movable derrick or hoisting engine operated by steam, and propelled by its own power over the tracks of the defendant company from place to place within its yard where its services were requested by shippers or receivers of freight, the engineer of said derrick being in the general employment of the defendant company, but acting under the orders and directions of shippers when engaged in loading cars, no charge ever being made by the railroad company for the use of said derrick and engineer, and no control ever being exercised over the engineer by the railroad company during the process of loading or un-

loading heavy freight, which is always done by the shipper or receiver (7, 12).

The iron involved in the controversy was angle iron located at 15th and H streets northeast, and the shipper thereof contracted with the Knox Express Company to haul it from said location and load it on cars in the yard of the defendant company at an agreed price per ton (7, 13, 15, 17). In carrying out this and similar contracts the Knox Express Company furnished its own men and machinery (13), including the chain used to hoist with, as the steam derrick had no chain (8), and the Knox Company used derrick or loaded by hand as it saw fit, the greater portion of heavy freight being loaded by aid of said derrick (18, 20).

The evidence clearly showed that on the occasion in question the pieces of iron were bundled together by one of the plaintiff's assistants in his own way and with his own chain (8-9, 16); that he called upon the engineer of the derrick to assist in loading the iron; that he assumed the direction of such loading in accordance with the custom of the yard and in performance of the contract of his employer, and that the injury was caused by the bundle of iron slipping out of the chain and falling on the plaintiff's head and shoulders while he was standing under it (6, 10, 12, 16, 19). But the evidence is contradictory as to what caused the bundle of iron to slip out of the chain, the plaintiff and his witnesses testifying that it was due to the negligence of the engineer in failing to obey orders given him, and to his roughness in handling the iron (6, 7, 8, 9), while the defendant's witnesses testified that it was due to

the careless and unskilful manner of bundling the iron, to the plaintiff's standing under the iron while pulling it into place, and to his disregard of expressed warnings and obvious danger (16, 18, 19).

In the situation presented by the foregoing facts, the plaintiff's case, as matter of law, clearly depended upon the legal status of the engineer of the derrick at the time of the accident, for if said engineer was then a servant of the Knox Express Company, the defendant railroad company could not be liable for his negligence. In granting the defendant's motion for a directed verdict, the court below held that the engineer of the derrick at the time of the accident was the servant of the Knox Express Company, delivering an opinion to that effect, which is filed in this cause under a stipulation of counsel establishing the accuracy of the transcript.

ARGUMENT.

In this case there is no doubt that the engineer of the derrick was in the general employment of the railroad company. Exactly when and how the general servant of one master may become the special servant of another has long been a disputed question upon which the authorities in both the State and Federal courts have heretofore been in direct conflict, but this question has now been put at rest by the unanimous decision of the Supreme Court of the United States in the recent case of Anderson *vs.* The Standard Oil Company, 212 U. S., 215, which case in all essential respects is identical in principle with this case, and the doctrine

therein announced is the rule to be applied here, although the result of the application of the rule leads to different results in the two cases because of differences in the facts involved.

In that case the servant of a stevedore loading a ship at a wharf was injured by the negligence of an engineer operating a hoisting engine belonging to the owner of the wharf, and there, as here, the case turned upon the question of whose servant the engineer was at the time of his negligent conduct. In discussing this question, the Supreme Court said that the general servant of one master may become the special servant of another, so as to relieve the former of responsibility for the servant's negligence, even though he was selected, employed, paid, and could be discharged by the general master, the true test of legal responsibility for the acts of the servant being whose work was being done at the time in question. In the Anderson case the work being done at the time of the accident was the work of the defendant owner of the wharf, as shown by the contract between the stevedore and the defendant, whereby the defendant agreed to do the hoisting for $1.50 per thousand pounds. But in the case at bar the hoisting was part of the work of the Knox Express Company, which it contracted to do, which it did do, and for the doing of which it was paid by the shipper of the iron. If any injury resulted from the way it was done, the Knox Express Company, or the engineer individually, may be liable to the sufferer, but the defendant railroad company, which turned over to the drayman, without charge or compensation, its instrumentalities for hoisting, which the drayman elected to

use for its own profit in the performance of its own contract with the shipper, cannot properly be made answerable for such an injury.

In the earlier case of Bryne *vs.* Kansas City R. R. Co., 61 Fed. Rep., 605, the Court of Appeals for the 6th Circuit reached the same conclusion as that of the Supreme Court in the Anderson case, the opinion in the Byrne case being delivered by Judge Taft and concurred in by Judge Lurton.

In addition to the exception of the plaintiff below to the action of the trial court in directing a verdict for the defendant, which has been heretofore discussed, the plaintiff took five other exceptions to various rulings of the court, which can be found on pages 13, 14, 17, and 20 of the printed record. These five exceptions, while varying somewhat in form and detail, are all based on the same singular proposition, namely, that because the action is made to sound in tort, no evidence of contract, or of contractual relations between the parties involved in the tort, should have been received. Yet the cause of action set up by the declaration rests on the alleged negligence of an alleged servant of a corporation, and consequently the right asserted is based on a contract of service supposed to exist between the defendant corporation and its supposed servant, and, surely, upon such an issue the defendant is entitled to show that the contract of service set up as the foundation of the action is superseded or suspended by another and a subsequent contract, for nothing could be more relevant or material to the very issue to be decided in the cause.

In connection with the defendant's testimony show-

ing the contract for the movement of the particular iron in question, the defendant also offered evidence of a long-established custom covering the shipment of similar freight by draymen in Washington, which testimony was received over the plaintiff's objections as set out in his exceptions numbered from one to five, *supra*, all of which, as already said, are based on the proposition that no evidence of contract should have been received in this action of tort, nor could any contractual relation be shown herein, whether it arose from a custom of the drayman's trade or by express agreement of the parties, and this, notwithstanding the fact that the legal status of all the parties to the controversy before the court depended entirely upon their contractual relations among themselves. The decision of the Supreme Court of the United States in the Anderson case is directly to the contrary.

In connection with the appellant's second exception, which appears on page 14 of the record, he goes a step further and contends that because the drayman sent a bill to the shipper of the iron a month after the shipment, no oral evidence concerning the contract of shipment could be received differing in tenor from the face of said bill. But an examination of the dates involved in the transaction is sufficient to dispose of this contention, as the contract in question was made prior to May 27th, upon which day performance thereof was fully completed (6-8, 12), while the said bill was made on June 29th. And it cannot be that a party litigant, whose rights and property depend upon a contract between two persons whose testimony agrees as to the oral form as well as to the terms of said contract, can

be deprived of their evidence because a month after the making and performance of said contract one party mails to the other a bill for his services thereunder. The most that could possibly be claimed for such a paper would be to receive it in evidence in connection with the testimony of the parties concerning their contract, and this was done. For the foregoing reasons it is respectfully submitted that the judgment of the trial court should be affirmed.

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